In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 663

ELMO T. CHRISTIANSON AND HERMAN PASTER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 412–431; Pet. App. 1–18) is reported at 226 F. 2d 646.

JURISDICTION

The judgment of the Court of Appeals (R. 432, 433) was entered on November 1, 1955. A petition for rehearing (R. 435–441) was denied on December 5, 1955 (R. 442). On December 27, 1955, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including February 3, 1956, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence supports petitioners' convictions for conspiracy to violate the Johnson Act, which prohibits the interstate transportation of gambling devices.

2. Whether the order of the court directing the impounding of certain corporate records in another district, issued after disobedience of a valid subpoena duces tecum, violated the Fourth Amendment rights of the sole stockholder of the corporation, and whether the use of such records violated the stockholder's privilege against self-incrimination.

STATUTE INVOLVED

Section 2 of the Act of January 2, 1951, 64 Stat. 1134, commonly known as the Johnson Act, 15 U. S. 1172, provides in pertinent part as follows:

> It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided,* That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from

the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

STATEMENT

On October 7, 1952, petitioners, together with Allan Nilva, were indicted (R. 1–11) in the United States District Court for the District of North Dakota, for conspiracy to transport gambling devices in interstate commerce in violation of 15 U. S. C. 1172, and conspiracy to defraud the United States by impeding the operation of that Act of Congress, which became effective on January 2, 1951. The conspiracy was alleged to have commenced about November 1, 1950 (R. 3) and to have continued until about April 15, 1951 (R. 11).

On the first trial the jury acquitted Nilva, but was unable to agree as to the guilt of petitioners (R. 50). On re-trial both defendants were found guilty as charged (R. 54). Petitioner Paster received a two year sentence and a $10,000 fine and petitioner Christianson was sentenced to serve one year and one day (R. 45). The Court of Appeals unanimously affirmed.

The evidence pertinent to the issues raised by the petition for a writ of certiorari may be summarized as follows:

Petitioner Christianson, then a candidate for Attorney General of North Dakota, went to James Brastrup (who became the principal witness for the prosecution) in July 1950 asking for assistance in raising money for campaign expenses (R. 61). Brastrup undertook the task on the understanding that he would help Christianson select his staff and that Christianson would be in a position to do him a lot of good (R. 61). When Christianson complained of insufficient funds, Brastrup told him that he understood there might be out-of-state money and mentioned a slot machine distributor. Christianson said that he did not care where he got the money (R. 62). Brastrup obtained an introduction to and arranged a meeting with Paster whom he asked for campaign funds for Christianson (R. 63–65). Paster refused to advance the money, but said that if Brastrup and his friends would do so, the first money that came in would be used to repay expenses (R. 65). Paster explained that he was in the coin-operated machine business and had operated in North Dakota. He said that all that would be necessary was for the Attorney General "to make some rulings and make some opinions that would overlook the operation of machines in North Dakota" (R. 65–66).

Ten days later Brastrup telephoned Paster and verified the agreement (R. 68). After Christianson's election, when Allan Nilva, an attorney and officer in Paster's corporation, called Brastrup up

to congratulate him, Paster said he wanted to meet Christianson (R. 68). On November 24, Brastrup and Christianson went to Minneapolis by plane, an alias being used for Christianson in making the reservations (R. 68). Christianson was nervous and impatient while waiting to see Paster at the latter's place of business (R. 69). When he and Brastrup were talking with Paster, the latter received a long distance telephone call, after which he asked the other two if they would go to Chicago (R. 69). When they agreed, Paster obtained airplane tickets, using another false name for Christianson (R. 70).

In Chicago, Paster introduced Christianson and Brastrup to officials of the Bally Manufacturing Company which manufactured coin machines (R. 70).[1] Paster and a Mr. Maloney talked with Christianson alone in a small room (R. 70). Christianson later reported to Brastrup that everything was going to be fine. "They're going to carry out their end of the agreement" (R. 70–71). The next day Paster handed Christianson an envelope saying "Here is the other thousand dollars and that makes it". Christianson said, "That's right", and pocketed the envelope (R. 71). Paster told Christianson: "Remember this and bear it in mind. That you can be sure that you're going to be offered a lot of money when you are in that office, but no matter what anybody

[1] The Mayflower Distributing Company (Paster's corporation) was one of Bally's five top distributors (R. 147).

offers to you and how much it is, you contact me and we'll always do better than what they did and we'll keep you out of trouble besides" (R. 71).

On the return plane, Brastrup told Christianson that he was short of money himself and asked if Christianson needed all of the $2,000 (R. 72). Brastrup related that "he looked at me kind of funny" and said that he did need it because he was buying a new house and needed a new car (R. 72).

About November 25, Paster called Brastrup to a meeting of North Dakota machine operators in his St. Paul office (R. 74). Paster told the men that a "great windfall has happened to you boys from North Dakota", and "There's going to be a lot of cake out there" (R. 75). He explained that Brastrup was dealing for Christianson out there and payoffs were to be made to Brastrup without any argument (R. 76). Paster told the operators to order machines as soon as they possibly could and that he would carry them on contracts (R. 76; see also R. 133, 138–139, 145, 158).[2]

Subsequently, when Brastrup reported to Christianson that Paster had been told that Christianson was no longer dealing through Brastrup, Christianson suggested that they go to Minneapolis and "straighten Paster out, once and

[2] Various operators in addition to Brastrup testified to this meeting (R. 133, 138–139, 145, 158).

for all" (R. 80). There the three reaffirmed the deal (R. 80). Paster took Christianson to a clothing store and bought him a new suit for his inauguration (R. 81).

During the latter part of December, Paster called Brastrup asking that the latter seek storage space for the machines (R. 82). He stated that there was a new law about to go into effect which would cripple interstate shipments. There were discussions about using Brastrup's garage, which was in East Grand Forks, Minnesota, across the river from Grand Forks, North Dakota, but no definite arrangements were made (R. 82–83).

On a visit to Paster's office late in December, Brastrup complained that he was receiving calls from operators wanting to know whether they were to buy the machines through Brastrup or directly from Paster, and Brastrup indicated dissatisfaction with "the way things were happening" (R. 83). Paster pulled a gun from his desk drawer and said Brastrup could be taken care of if he talked too much (R. 83). Arrangements were made that machines in the clubs were to be operated by Paster, Brastrup and Christianson, not by the machine operators, and that Christianson was to get 10% of the money that came in from the various operators (R. 76, 83). Christianson's brother-in-law was to act as repair man for the machines, but the brother-in-law later refused to have anything to do with slot machines (R. 77, 87–88, 154–155).

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Immediately prior to and after Christianson's inauguration in January, 1951, Brastrup collected various sums of money ranging from $175 to $500 from machine operators (R. 84). On January 8, Brastrup told Paster that it seemed to him that Paster and Christianson wanted to work directly and that if he could obtain a loan of $10,000 to $15,000 on his business he would step out (R. 86–87). Brastrup did, however, continue to take payments from operators in February and March, 1951 (R. 88). Late in February, when one operator asked Christianson if they should deal with him directly, Christianson told them to deal with Brastrup (R. 88–89). Christianson and Brastrup eventually dissolved their relationship in April of 1951, Christianson paying $1500 to Brastrup for a release for all claims (R. 91). Although Christianson's bank account showed only minor currency deposits from January to November, 1950, (R. 137–138), the amount of cash or currency deposited by Christianson from November 6, 1950, to April 15, 1951, was $2560 (R. 363).

Among the operators who made payments to Brastrup was one Baeder who paid sums on December 29, 1950 and in February and March, 1951 (R. 84, 88). Records of the Mayflower Distributing Company (Paster's corporation) revealed sales of slot machines to Baeder on January 22, 1951 (R. 215). Baeder testified that he had attended the operators' meeting in Paster's office (R. 138); that he made contributions to Brastrup

(R. 139) and that, in February, 1951, when he complained to Brastrup that one of his machines had been picked up, Brastrup told him there would be a favorable ruling and he would get the machine back (R. 139). On January 22, 1951, Baeder in his own truck picked up at the Mayflower Distributing Company four machines which he had ordered on December 26, 1950 (R. 140).

The Mayflower Company's records showed sales of slot machines to Emil Christianson in North Dakota on January 25, 1951, and payment to a trucking company on February 1, 1951, for a trip to Williston, North Dakota, where Christianson lived (R. 215, 222). The records also reflected sales on January 11 and 12, 1951, to one Sande in North Dakota (R. 215). Sande was one of the operators who paid money to Brastrup (R. 171).

ARGUMENT

1. Petitioners contend (Pet. 10–12) that, in their case, where the conspiracy was formed in advance of the effective date of the statute they are charged with violating, there is uncertainty as to the standard of proof required to show adherence to or reaffirmation of the conspiracy after such date. They contend also (Pet. 15) that no proof was made of their adherence to the conspiracy. Both contentions are without substance.

The applicable principles are clear. Inception of the conspiracy before the Act took effect could be shown. *Heike* v. *United States,* 227

U. S. 131, 145; *Nyquist* v. *United States,* 2 F. 2d 504 (C. A. 6). A conspiracy is a continuous offense until consummated or abandoned. See *Brown* v. *Elliott,* 225 U. S. 392, 400; *United States* v. *Kissel,* 218 U. S. 601, 607, 608. Without evidence of abandonment, the presumption is that the conspiracy continued to exist. *Nyquist* v. *United States, supra; Remus* v. *United States,* 291 Fed. 501 (C. A. 6); see *United States* v. *Perlstein,* 126 F. 2d 789, 798 (C. A. 3).

The trial judge correctly instructed the jury. He told them that the evidence of agreement among, or acts of, the alleged conspirators prior to January 1951, was received only to disclose the nature, character, aims and objectives of any agreement or conspiracy existing on and after January 2, 1951 (R. 379, 380); that a conspiracy can be made by tacit understanding between the parties, and may be implied from the acts and conduct of the parties (R. 377). He instructed them on abandonment as follows (R. 379):

> If a person enters into an unlawful conspiracy but withdraws therefrom or abandons the conspiracy before any overt act in furtherance of the object of the conspiracy has been committed by any of the co-conspirators, he, of course, cannot be held guilty. To abandon a conspiracy, once having entered into it, however, such person must perform some positive act or make some positive statement so as to indicate clearly that it was his intention to

> abandon the unlawful agreement or conspiracy. He may not, once having joined a conspiracy, do nothing further and then claim that he was not responsible for the acts of those with whom he conspired. The abandonment must be positive and must clearly indicate the intent of such person or persons to abandon the unlawful agreement.

The evidence establishes that petitioners were part of a conspiracy, continuing after the effective date of the Johnson Act, which had as one of its objectives the shipment of slot machines in interstate commerce. While the conspiracy undoubtedly had other ramifications, one of its purposes, from its inception, was to promote the sale of slot machines by Mayflower to dealers in North Dakota. Paster's conference with a number of North Dakota dealers in November, 1950, when he urged them to order machines as quickly as possible (see *supra* p. 6) establishes this objective very clearly. And certainly the jury could infer from all the facts that Christianson, who knew that Paster was a large dealer in slot machines, was fully aware that this was one of the purposes of their arrangements. There was nothing to show that this objective of the conspiracy was abandoned after the Johnson Act went into effect. The evidence is to the contrary. The fact is that Mayflower continued to make deliveries, after the enactment of the Johnson Act, to operators in North Dakota who were in the

"pay-off" scheme which the conspiracy embraced. The delivery on January 22 of machines to be used in North Dakota by Baeder, one of the persons making regular payments to Brastrup, in itself shows that the original conspiracy was not abandoned, but continued in its original form. It was, of course, not necessary that any of the conspirators should have known or authorized any specific shipment; it was sufficient that they continued to participate in a conspiracy, one of the general objectives of which was the shipment of slot machines in interstate commerce after enactment of the Johnson Act. See *Pinkerton* v. *United States,* 328 U. S. 640; *Blumenthal* v. *United States,* 332 U. S. 539; *Nye & Nissen* v. *United States,* 336 U. S. 613.

2. In preparation for the second trial of petitioners, the trial court, on request of the Government, issued subpoenas (R. 20–23) to Mayflower Distributing Company to produce certain books and records reflecting purchases and sales of slot machines. The subpoenas were returnable on the date set for the beginning of the trial. On that date Paster filed a motion to quash (R. 24), arguing that the subpoenas violated his rights under the Fourth and Fifth Amendments, because, as he set forth by affidavit, the corporation was wholly owned by himself (R. 24–28). Paster and his auditor also testified directly as to his relationship with the corporation (R. 56–58). The motion was denied (R. 28, 29). The government moved orally

that the books and records be produced forthwith and the court so ordered (R. 35). On the third day of the trial, April 1, 1954, the court, noting that the officers of Mayflower had failed to produce the records, entered an order that the court's Marshal impound all of the records of Mayflower at their place of business in St. Paul, Minnesota (R. 35, 36). An FBI agent transported the records from the United States Marshal at St. Paul to the United States Marshal at Bismarck (R. 211, 212). With other agents, he analyzed them for the material needed (R. 212).

Petitioners argue (Pet. 24–27) that the impounding order was an unlawful search in violation of Rule 41 (a), F. R. Crim. P. since the records were not in the territorial jurisdiction of the court from which the order emanated. The district court's subpoena power, however, ran throughout the United States. Rule 17 (e) (1), F. R. Crim. P. Its order impounding the records was merely a means of enforcing its own valid subpoena.

Moreover, neither petitioner has any standing to raise the issue. Christianson had no interest at all in the Mayflower Company. As to Paster, the corporate form under which he chose to do business likewise bars him from asserting the claim. Even if the seizure had been illegal as to the corporation, which was not the case, its wrongs are not his wrongs, nor ~~is~~ are its rights his. *Lagow* v. *United States,* 159 F. 2d 245 (C. A. 2),

certiorari denied, 331 U. S. 858. There is no unreasonable search and seizure "when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced." *Wilson* v. *United States,* 221 U. S. 361, 376.

For the same reason, there is no merit in Paster's contention that the enforced production of Mayflower Corporation's records violated his privilege against self-incrimination. It is settled that "if the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. * * * Nor is it an answer to say that * * * the inquiry before the grand jury was not directed against the corporation itself". *Wilson* v. *United States,* 221 U. S. 361, 384, 385. Since petitioner chose to rely on the benefits which inure in the corporate form of doing business, he must accept whatever adverse results flow from that choice. *Lagow* v. *United States,* 159 F. 2d 245 (C. A. 2), certiorari denied, 331 U. S. 858.

CONCLUSION

There is no conflict of decisions and petitioners' case is ruled by settled principles. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

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